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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES GREGG SIMMONS, PETIONER

v.

THE STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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JAMES GREGG SIMMONS, PETITIONER

v.

THE STATE OF GEORGIA

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James Gregg Simmons petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINION BELOW

The opinion of the Supreme Court of Georgia is set out in its entirety in Appendix B, *infra.*

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 9, 1980 (App. B, *infra*). Petitioner's motion for rehearing was denied on September 23, 1980 (App. A, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

QUESTION PRESENTED

Whether the Georgia Firearms and Weapons Act (App. D, *infra*) violates the due process clause of the Fourteenth Amendment in that it places the burden of proof on a criminal

defendant to prove certain exceptions and exemptions for prosecution under said act.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Georgia Code § 26-2907 and § 26-9915(a) as set out in Appendix D, *infra*, and the Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT

NOTE: The Clerk of the Supreme Court of Georgia has not been requested to file a copy of the transcript in this case because the factual scenario that led to petitioner's arrest and conviction is of no importance for this Court's consideration of the question presented. Petitioner includes a brief synopsis of the facts in this case without reference to the transcript as background information only. The statement of the case portion of this section is presented in accordance with the rules of this Court.

James Gregg Simmons, petitioner, is a building developer and presently resides in Douglas, Georgia. He is an avid hunter and over the years has become interested in guns and considers himself to be a gun collector. At the time of the trial of this case, he had a collection consisting of twenty-five to thirty guns. While he has accumulated various guns over the years, he never owned any automatic weapons and he became interested in purchasing one automatic weapon for his collection.

On June 13, 1979, petitioner informed a hunting companion, Mr. Dwight Knight, that he was interested in purchasing an automatic weapon for his collection. Knight informed petitioner that he had located some of these weapons and the next day, June 14, 1979, petitioner drove to Moultrie, Georgia to meet with Knight and the man who had the weapons for sale. In Moultrie, petitioner met with Mr. Rex King at King's place of business. King ran a western shoe store, had a federal firearm's license, and dealt in guns from time to time. Petitioner informed King that he was interested in buying one automatic weapon and King told petitioner on this

date that he didn't have the gun but that a friend of his had it and had not returned it. Petitioner was advised to return the next day. King's testimony is highlighted in the Georgia Court of Appeals decision in this case. (App. C, *infra*).

On June 15, 1979, petitioner returned to Moultrie, Georgia and after meeting with Knight, the two drove to King's place of business in Knight's car. King's place of business is located in downtown Moultrie, Georgia and petitioner and Knight went there during the hours of daylight. Petitioner got out of the car and went inside King's place of business and King exhibited to him some six to eight automatic weapons of the type which petitioner had indicated he wanted to purchase for his collection. Unknown to petitioner, the weapons involved in the transaction were being provided by law enforcement officials and the entire transaction was being set up under the guidance of law enforcement officials, and the weapons were to be sold without complying with federal registration requirements. Petitioner agreed to purchase two of the automatic weapons and one silencer; paid for the weapons and placed them in Knight's car. Before leaving King's place of business, petitioner was advised that the guns were not stolen and King assured petitioner that he was a gun dealer. Petitioner informed King that he intended to register the guns. Petitioner got into Knight's car to leave the area and was arrested.

On July 10, 1979, petitioner was indicted for the offenses of machine gun possession and violation of the Georgia Firearms and Weapons Act. Petitioner was tried before a jury in Superior Court of Colquitt County, Georgia, and found guilty. At the conclusion of the state's case, petitioner made a motion for a directed verdict of acquittal questioning the constitutionality of the portions of the Georgia Firearms and Weapons Act under which he was being tried. This motion for a directed verdict was overruled by the trial court. The Court of Appeals of Georgia later ruled that the question of the constitutionality of the Georgia laws was not properly raised at the trial court. (App. C, *infra*). However, the Supreme Court of Georgia reversed that ruling (App. B, *infra*) and the question of the

constitutionality of the Georgia Firearms and Weapons Act and related statutes is properly before this Court.

Petitioner was sentenced on September 12, 1979 to serve five years on each of the two counts in the indictment. Petitioner filed a timely motion for new trial which was overruled by the trial court and entered on the record on October 29, 1979. The trial court's decision was appealed to the Court of Appeals of Georgia and that court affirmed petitioner's conviction on March 18, 1980. (App. C, *infra*).

On May 28, 1980, the Supreme Court of Georgia granted petitioner's petition for writ of certiorari, noting that the court was particularly concerned with whether or not Georgia Code Ann. §§ 26-2907 and 26-9915a unconstitutionally allocated to the defendent the burden of proof regarding the statutory exceptions or exemptions thereto. On September 9, 1980, the Supreme Court of Georgia affirmed petitioner's conviction and held that the statutory scheme of Georgia Firearms and Weapons Act was not unconstitutional as a violation of the due process clause of the Fourteenth Amendment. (App. B, *infra*). Petitioner's motion for rehearing of that decision was denied on September 23, 1980. (App. A, *infra*).

REASONS FOR GRANTING CERTIORARI

Petitioner was convicted of one count of possession of a machine gun in violation of Georgia Code Ann. § 26-2906 and one count of violation of the Georgia Firearms and Weapons Act. Georgia Code Ann. § 26-9912(a) (App. D, *infra*). Each of these statutory provisions have certain exceptions and exemptions thereto and statutory language placing the burden of proof on a criminal defendant to prove these exceptions and exemptions. See Georgia Code Ann. § 26-2907 and § 26-9915a (App. D, *infra*). As the Supreme Court of Georgia noted in its decision "...the Criminal Code § 26-2907 provides that the prosecution need not negative any exemption, whereas the Firearms Act contains not only that provision but also prescribes that the burden of proof of exemption shall be on the defendant." (App. B, *infra*). Petitioner questions whether the entire statutory scheme under which petitioner was arrested and convicted violates the Fourteenth Amendment and for purposes of this petition, petitioner refers to the entire statutory scheme as the Georgia Firearms and Weapons Act in the sake of brevity although technically § 26-2906 and § 26-2907 are included in the general criminal code of the state of Georgia and not the firearms act.

1. The essence of the due process clause of the Fourteenth Amendment demands that a citizen is innocent until proven guilty and the prosecution must prove that a citizen is guilty beyond a reasonable doubt before one can be convicted of a crime. *In Re Winship*, 397 U.S. 358; *Chambers v. Florida*, 309 U.S. 227; and, *Duncan v. Louisiana*, 391 U.S. 145. By reducing the burden of proof required for conviction in one instance and shifting the burden of proof in the other, the Georgia statutes under consideration clearly violate the foregoing fundamental rights.

Petitioner concedes that this Court in *Patterson v. New York*, 432 U.S. 197 suggested that state legislatures may "reallocate burden of proof by labelling as affirmative defenses at least some elements of the crimes now defined in their statutes." (432 U.S. at 210). At the same time this Court warned that there are obvious limits to such a practice and: "It is not within the province of the legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86. Of utmost importance, too, is the fact that the traditional affirmative defenses have been insanity, self-defense, alibi, entrapment and duress and the statutes under scrutiny here concern possession of firearms. See, e.g., 11 *Harv. Civ. Rights-Civ. Liberties L. Rev.* 390 (1976); and, 29 *Am. Jur. 2d Evidence* § 156 (1967).

Petitioner contends that the Georgia statutes under consideration represent an impermissible shifting of the burden of proof. Further, Georgia is not alone in this regard in that other states have in effect criminal statutes that follow the same pattern. See *State v. Neary*, 409 A.2d 551, a Rhode Island case. Thus, a consideration of petitioner's case by this Court will clarify the bounds a state legislature must stay within when drafting their firearms possession laws.

2. Within the past ten years, this Court has considered the due process requirements as to the burden of proof in criminal prosecutions in a variety of contexts.

In 1970, this Court decided *In Re Winship, supra.* in which a New York juvenile's conviction for stealing was reversed because his guilt was only determined by a preponderance of the evidence. This Court held that proof beyond a reasonable doubt is among the essentials of due process and fair treatment required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult. Mr. Justice Brennan wrote: "Lest there remain any doubt about the constitutional stature reasonable-doubt standard, we explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (397 U.S. at 364).

In *Mullaney v. Wilbur*, 421 U.S. 684, this Court held that the prosecution is required to establish all elements of a criminal offense beyond a reasonable doubt, and that presumptions which shift the burden of proof concerning such elements to the defendant are invalid. Citing *Winship, supra*, this Court concluded that the prosecution must prove all elements of a criminal offense beyond a reasonable doubt, and could not constitutionally shift the burden of proving such elements to the defendant.

In a landmark decision handed down last year, this Court reversed a murder conviction in a Montana State court, finding a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violative of due process. *Sandstrom v. Montana*, 442 U.S. 510. In *Sandstrom* this Court followed *Winship, Mullaney* and *Patterson, supra*, and held the jury instruction constitutionally defective, reasoning that the jury might have interpreted the presumption in the instruction as a conclusive presumption, which would conflict with the overriding presumption of innocence which is endowed upon an accused by law, and the jury might also have interpreted the presumption as being one shifting the burden of persuasion to the defendant to prove that he lacked the requisite mental state.

It is clear from these decisions that Ga. Code Ann. § 26-2907 and § 26-9915a are constitutionally defective.

Again, in this particular case, the petitioner was convicted of possession of a machine gun and a silencer under Ga. Code Ann. § 26-2906 and § 26-9912a. (App. D, *infra*). These code sections and other sections referred to within these code sections make it clear that the mere possession of a machine gun and silencer is not unlawful. The possession of a machine gun is not any more unlawful per se than possession of a pistol. Any citizen of Georgia can own and possess either type of weapon so long as they have the proper "licenses". Ga. Code Ann. § 26-2904, § 26-9914a. Both weapons can be lawfully possessed. It is when they are unlawfully possessed, that is, for example, without a license, that criminality attaches. Further, in order for possession of these weapons to be unlawful, none of the exemptions or exceptions set forth in Ga.

Code Ann. § 26-2907 and § 26-9914a can apply, for if any are applicable, the possession is lawful.

The statutory exemptions and exceptions are "facts critical to criminal culpability." (421 U.S. at 702). Under the present statutory scheme, the State of Georgia in a prosecution for possession of such weapons is not required to prove the possession "unlawful". The prosecution can simply prove possession. Once possession of the weapon is proven, the defendant than has the burden to prove that his possession is lawful. There is no question as to where this burden is placed. Ga. Code Ann. § 26-2907 provides:

> "A prosecution based upon a violation of sections 26-2901, 26-2902, 26-2903, or 26-2906 need not negative any exemptions."

Also, Ga. Code Ann. § 26-9915a provides in pertinent part:

> "In any . . . indictment, and in any action or proceeding brought for the enforcement of any provision of this law. . ., it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this law, *and the burden of proof of any such exception, excuse, proviso or exempion shall be upon the defendant.*" (Emphasis added).

These statutory provisions placing the burden of proving the exemptions and exceptions and thus in effect placing the burden upon defendant of proving his possesion lawful and refusing to require the prosecution to prove beyond reasonable doubt facts which make possession of certain weapons unlawful, is exactly the type of provisions proscribed by *Winship, Mullaney, Patterson* and *Sandstrom, supra.*

In this case the prosecution was required to show criminal intent ont he part of petitioner. It was an essential ingredient of the crimes charged. The exemptions and exceptions serve to negate the intent of petitioner. Under the statutory scheme here, the burden was upon petitioner to negate criminal intent by showing that one of the statutory exemptions or exceptions was applicable. This in effect relieved the prosecution from proving criminal intent, and allowed it to be presumed unless the petitioner shouldered the

burden of proof as to the exceptions and exemptions. Such a burden shifting provision is clearly contrary to the due process guarantees of the Fourteenth Amendment.

Moreover, it is clear that the exemptions and exceptions referred to in the definition of the crimes set forth in these code sections are essential ingredients of the crimes. To place the burden of proof upon a defendant as to the exceptions and exemptions under such circumstances is clearly unconstitutional. *Mullaney v. Wilbur, supra.* In short, in a criminal proceeding, "(T)he burden of proof must be on the state throughout; not sometimes on the state and sometimes on the defendant." *Wilbur v. Mullaney*, 496 F.2d 1303, 1307 (1st Cir. 1974).

3. The Respondent cannot contend that the exemptions and exceptions set forth here are peculiarly within the knowledge of a defendant and therefore the legislature was justified in placing the burden of proof on the defendant. *Tot v. United States*, 319 U.S. 463; and, *McFarland v. American Sugar Refining Co., supra.* A careful review of the exemptions and exceptions set out in Ga. Code Ann. § 26-2907 (App. D, *infra*) and repeated in Ga. Code Ann. § 26-9914a reveals that each one could easily be negated by the prosecution. However, the prosecution did not do so here and petitioner suggests it should not be the burden of a defendant to take on this responsibility. Such statutes are unconstitutional on their face.

4. Finally, the question presented is of crucial importance not only to this petitioner but to criminal defendants in other states as well. If state legislatures are allowed to go unchecked in their efforts to place burdens of proof on criminal defendants the long standing proposition in this country that citizens are innocent until proven guilty will become a fundamental right enjoyed only by our forefathers.

The importance of this basic tenant in our criminal justice system and the proposition that guilt must be proved beyond a reasonable doubt is clear. If statutes like the two under scrutiny here are allowed to stand, criminal defendants will be required in every instance to introduce evidence on their behalf thus losing the

right to make the final closing argument in jury cases and subjecting themselves to cross-examination for possible unrelated criminal conduct as an attack on their character. These are the most common problems arising under the firearms laws in Georgia and elsewhere and present one of the most compelling reasons why this Court should take this opportunity to clarify the law, and, to the extent necessary rectify a situation where criminal defendants are being denied due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

Thomas Day Wilcox, Jr.
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Attorneys.

APPENDIX A

In the Supreme Court of Georgia

Case No. 36344

JAMES GREGG SIMMONS

v.

THE STATE

The Motion for a Rehearing was denied today.

September 23, 1980

MRS. JOLINE B. WILLIAMS, *Clerk*

APPENDIX B

In the Supreme Court of Georgia

Case No. 36344

JAMES GREGG SIMMONS

v.

THE STATE

Hill, Justice.

We granted certiorari in Simmons v. State, _____ Ga. App. _____ (59531 decided March 18, 1980), to determine the constitutionality of the burden shifting provisions of certain of our firearms laws, namely Code §§26-2906 and 26-2907 of the Criminal Code of 1968 (Ga. L. 1968, pp. 1249;, 1324), relating to machine guns, and section 6 of the Firearms and Weapons Act (Ga. L. 1968, pp. 983; Code Ann. § 26-9915a), relating to silencers and other firing devices and weapons. Upon further consideration we find that the burden shifting provisions of those laws are not involved here and affirm.

James Gregg Simmons was indicted for and found guilty of possession of a machine gun in violation of the former law and possession of a silencer in violation of the latter. Contrary to the decision of the Court of Appeals, we find that the constitutional challenge to these laws was raised in the trial court of the defendant's motion for directed verdict. Although the challenge could have been made earlier, it was not too late. A criminal defendant may challenge the constitutionality of the statute *the violation of which he was convicted* for the first time on habeas corpus, *Hammock v. Zant*, 243 Ga. 259 (253 SE2d 727) (1979), and

may challenge the constitutionality of such statute for the first time on appeal, *Barnes v. State*, 244 Ga. 302 (1) (260 SE2d 40) (1979). It follows that even though a criminal defendant may challenge, before trial, the constitutionality of the statute alleged in the indictment by demurrer, motion to quash, or plea in bar, by properly raising the constitutional objection,[1] it is not too late to challenge the statute on which an indictment is based on motion for directed verdict.

Sections 26-2906 and 26-2907 of our Criminal Code provide as follows:

§ 26-2906. "A person commits a felony when he sells, manufactures, purchases, possesses, or carries a machine gun and upon conviction shall be punished by imprisonment for not less than one nor more than five years. A machine gun is any weapon from which more than five years. A machine gun is any weapon from which more than eight shots or bullets may be discharged by a single function of the firing device. This section shall not apply to or affect the manufacture, for, or the transportation, or sale of machine guns to persons exempted under section 26-2907, provided said machine guns are broken down in a non-functioning state or are not immediately accessible."

§ 26-2907. "Sections 26-2901, 26-2902, 26-2903 and 26-2906 shall not apply to or affect any of the following persons while engaged in pursuit of official duty or when authorized by Federal or State law, regulation or order: (1) Peace officers: (2) wardens, superintendents, and keepers of prisons, penetentiaries, jails, or other institutions for the detention of persons accused or convicted of an offense; (3) persons in the military service of the State or of the United States; (4) persons employed in fulfilling defense contracts with the Government of the United States or agencies thereof when possession of the weapon is necessary for manufacture, transport, installation, and testing under the requirements of such contract; and (5) district attorneys, investigators employed by and assigned to a district attorney's

[1]See 5 E.G.L. Constitutional Law § 183, p. 531 (1977).

office, and assistant district attorneys. A prosecution based upon a violation of sections 26-2901, 26-2902, 26-2903, or 26-2906 *need not negative any exemptions*." (Emphasis supplied.)

Sections 26-2901 and 26-2903 refer to the crimes of carrying a concealed weapon, deadly weapons at public gatherings, and carrying a pistol without a license.

The Firearms and Weapons Act (Ga. L. 1968, p. 983) refers to sawed-off rifles and shotguns, machine guns, dangerous weapons (e.g., bazookas) and silencers. Section 3 makes knowing possession of such weapons a crime. Section 5 (Code Ann. § 26-9914a) exempts certain law enforcement and peace officers including certain employees of the Board of Corrections, certain military serviceman, certain inoperable weapons, and persons authorized by the National Firearms Act (26 USC 5841-5862).[2] Section 6 (Code Ann. § 26-9915a) provides as follows: "In any complaint, information, accusation or indictment, and in any action or proceeding brought for the enforcement of any provision of this Act, *it shall not be necessary to negative* any exception, excuse, proviso or exemption contained in this Act, *and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant.*" (Emphasis supplied.)

It should be noted that the Criminal Code merely provides that the prosecution need not negative any exemption, whereas the Firearms Act contains not only that provision but also prescribes that the burden of proof of exemption shall be on the defendant.

Hence the Criminal Code provision in issue, Code § 26-2907, which merely provides that the prosecution need not negative any exemption is burden reducing but is not burden shifting. No contention is made that the Constitution is violated by this burden reduction (i.e., no contention is or could be made that the first two sentences in Code § 26-2906, standing alone, are unconstitutional); the Criminal Code provision shifts no burden to the defendant; and

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[2]It should be noted that the exemptions contained in the two laws are not identical but are substantially similar (compare Code §26-2907 with Code Ann. § 26-9914a).

hence the question raised on certiorari as to shifting the burden of proof is not presented by Code §§ 26-2906, 26-2907. Moreover, as will be seen below, the trial court placed no burden of proof on the defendant as to either of the two laws in issue. Therefore, defendant's conviction of possession of a machine gun is affirmed.

As heretofore noted, the Firearms and Weapons Act (Code Ann. § 26-9915a) does provide that "... the burden of proof of any exception, excuse, proviso or exemption shall be upon the defendant."[1] This act does not provide whether this burden of proof is one of producing evidence or one of persuasion (and if one of persuasion the degree thereof). In our view, the statutory provision itself is not unconstitutional. *Patterson v. New York*, 432 U.S. 197 (SC , LE2d) (1977). See also the discussion of *Morrison v. California*, 288 U.S. 591 (53 SC 401, 77 LE 970) (1933), in *Morrison v. California*, 291 U.S. 82, 87-89, (54 SC 281, 78 LE 664) (1934), approved in *Patterson*, supra, fn. 9. See also *United States v. Paulton*, 540 F2d 886, 892 (8th Cir. 1976).

Moreover, in the case before us, in accord with *State v. Moore*, 237 Ga. 269 (1) (227 SE2d 241) (1976), the trial court did not charge that the burden of proof of exemption is upon the defendant. The trial judge charged the presumption of innocence, the state's burden of proof beyond a reasonable doubt as to each element of the crime, and that the state's burden of proof in a criminal case never shifts to the accused to prove his innocence, omitting all reference to the statutory language as to negativing exemptions and the statutory burden of proof upon the defendant. In fact, because there was no evidence as to any exemptions the trial judge did not charge the jury as to exemptions (although the defendant had requested a charge as to the exemptions in the Firearms Act, Code Ann. § 26-9914a) until the jury asked for clarifying instruction as to any exemptions regarding machine guns, at which time the court merely gave in charge the exemptions applicable to machine guns, Code § 26-2907,

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[1]The above discussion as to burden reduction would be equally applicable to the provision in Code Ann. §26-9915a that "it shall not be necessary to negative any exception. . . ."

plus the National Firearms Act exemption from Code Ann. § 26-9914a (d) as to machine guns and silencers. Hence, although the issue of exemptions was raised by defendant's request to charge, no burden shifting or burden reducing charge as to those exemptions was given. It follows that both convictions, as to the possession of a machine gun and silencer, should be affirmed.

Judgment affirmed. All the Justices concur.

September 9, 1980.

APPENDIX C

In the Court of Appeals for the
State of Georgia

Case No. 59531

Banke, Judge

The defendant was convicted of one court of possession of a machine gun in violation of Code Ann. § 26-2906 and one count of possession of a silencer in violation of the Georgia Firearms and Weapons Act (Code Ann. § 26-9912 (a)). He was sentenced to five years' imprisonment and now appeals the denial of his motion for new trial. Although seven alleged errors are enumerated, five of these are directed to the sufficiency of the evidence and will be considered together.

Held:

1. The defendant contends that constitutional standards of due process placed on the state the burden of proving that he was not entitled to possess the weapons under one of the exemptions listed in Code Ann. § 26-2906 or Code Ann. § 26-9912 (a). However, Code Ann. §§ 26-2907 and 26-9915 (a) specifically provide that the defendant has the burden of establishing entitlement to these exemptions. The defendant's contention that these statutes are unconstitutional was not advanced in the trial court and therefore may not be considered on appeal. *Andrews v. Mayor & c. of Savannah*, 25 Ga. App. 182 (2) (102 SE2d 875) (1920); *Wellfort v. Bowick*, 147 Ga. App. 565 (4) (249 SE2d 363) (1978).

2. The defendant does not deny that he purchased the machine gun and silencer but contends that there is nothing to refute his testimony that he acted with the innocent belief that he could

register the items and add them to his private gun collection rather than with criminal intent or wrongful purpose. However, the dealer who sold the weapons to the defendant testified as follows: "He [the defendant] wanted to know the type of weapons. How many I could get. And silencers, M-16's. He wanted M-16's. He wanted those with silencers. He wanted grenades. Phosphorus grenades. Silenced .22 rifles. Silenced .22 pistols. He wanted antitank weapons. He wanted antitank bazookas. Light weight antitank weapons. He wanted all the ammunition I could get for antitank rifles and any M-1's as many as I could buy." Asked whether he knew what the defendant intended to do with the weapons, the witness responded, "Yes, sir. Both he and Dwight [a co-defendant] commented on this. They were going to keep some for their own selves. They were having problems with some shipments. Contraband coming out of South America and they had lost six out of ten of their last ship loads and there was some people involved in their organization and they wanted to wipe them out." We hold that this testimony was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the defendant acted with criminal intent in making the purchases.

3. It was not error to deny the defendant's motion to quash the indictment because he had not received a committment hearing. See *State v. Middlebrooks*, 236 Ga. 52, 54 (222 SE2d 343) (1976); *Walker v. City of Atlanta*, 238 Ga. 723, 724 (235 SE2d 28) (1977).

4. Any error committed by the trial judge in initially failing to charge the jury on the exemptions listed in Code Ann. § 26-9914 (a) was cured by his action in calling the jury back from their deliberations to instruct them on this statute as requested.

Judgment affirmed. McMurray, P.M., and Smith, J., concur.

APPENDIX D

Ga. Code Ann. § 26-2901 Carrying a Concealed Weapon.
(Not applicable to this case)
Ga. Code Anna. § 26-2902 Deadly Weapons at Public Gatherings.
(Not applicable to this case)
Ga. Code Ann. § 26-2903 Carrying Pistol Without License.
(Not applicable to this case).

Ga. Code Ann. § 26-2906 Machine guns; Sale, etc., Illegal

"A person commits a felony when he sells, manufactures, purchases, possesses, or carries a machine gun and upon conviction shall be punished by imprisonment for not less than one nor more than five years. A machine gun is any weapon from which more than eight shots or bullets may be discharged by a single function of the firing device. This section shall not apply to or affect the manufacture, for, or the transportation, or sale of machine guns to persons exempted under section 26-2907, provided said machine guns are broken down in a nonfunctioning state or are not immediately accessible."

Ga. Code Ann. § 26-2907 Same; Exemptions

"Sections 26-2901, 26-2902, 26-2903, and 26-2906 shall not apply to or affect any of the following persons while engaged in pursuit of official duty or when authorized by Federal or State law, regulation or order: (1) peace officers; (2) wardens,

superintendents, and keepers of prisons, penetentiaries, jails, or other institutions for the detention of person accused or convicted of an offense; (3) persons in the military service of the State or of the United States; (4) persons employed in fulfilling defense contracts with the Government of the United States or agencies thereof when possession of the weapon is necessary for manufacture, transport, installation, and testing under the requirements of such contract; and (5) district attorneys, investigators employed by and assigned to a district attorney's office, and assistant district attorneys. A prosecution based upon a violation of sections 26-2901, 26-2902, or 26-2906 need not negative any exemptions."

Ga. Code Ann. § 26-9912a Same; Punishment

"A person commits an unlawful possession of firearms or weapons when he knowingly has in his possession any sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon or silencer, as defined in this law [§§ 26-9910a through 26-9916a], and upon conviction for such he shall be punished by imprisonment for not less than one nor more than five years.

Ga. Code Ann. § 26-9915a Same; Burden of Proof of Exceptions, etc.

"In any complaint, information, accusation or indictment, and in any action or proceeding brought for the enforcement of any provision of this law [§§ 26-9910a through 26-9916a], it shall not be necessary to negative any exception, excuse, proviso or exemption contained in this law, and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant."